

*original
(w/ attachments)*

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

**ORIGINAL
FILE**

In the Matter of)
) PR Docket No. 92-144
Application of)
)
)
RICHARD A. BURTON)
Harbor City, California)
)
For Amateur Station)
and Operator Licenses)

RECEIVED

JUL 31 1992

To: Administrative Law Judge Edward J. Kuhlmann

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MOTION FOR SUMMARY DECISION

The Chief, Private Radio Bureau (Bureau), by his attorneys, moves, pursuant to Section 1.251(a) of the Commission's Rules, 47 C.F.R. § 1.251(a), for a summary decision denying the captioned application for amateur station and operator licenses. Copies of pertinent public records are attached.

1. On December 17, 1989, Mr. Richard A. Burton submitted to the Commission an application for the grant of an amateur service station license and a Novice Class amateur operator license. On December 20, 1991, following the completion of Burton's probationary period for a criminal conviction (see paragraph 2, infra), the Bureau evaluated Burton's application and was unable to find that granting the application would serve the public interest, convenience and necessity (see attached letter). Burton then requested a hearing on this matter (see attached letter of February 1, 1992). Accordingly, on July 9, 1992, pursuant to Section 309(3) of the Communications Act of 1934, as amended,

47 U.S.C. § 309(e), the Bureau designated Burton's application for this proceeding .

2. On September 11, 1981, the Bureau revoked Burton's amateur station license and affirmed the suspension of his operator license because of his willful and repeated violations of the Commission's Rules in the amateur services. See Order of Revocation and Affirmation, PR Docket No. 81-444 (September 11, 1981) (attached). Following this action, Burton, on three separate occasions, was convicted in federal court for transmitting in the amateur services without a Commission license. See United States of America v. Richard A. Burton, No. CR 82-378-R (C.D. Cal. June 28, 1982) (conviction on four counts of transmitting without a license and two counts of transmitting obscene language) (Judgment and Probation/Commitment Order attached); United States of America v. Richard A. Burton, No. 82-00378 (C.D. Cal. May 1, 1984) (finding violation of the terms of probation by operating a radio apparatus without a license; modifying sentence to include therapy) (Judgment and Probation/Commitment Order attached); United States of America v. Richard A. Burton, No. CR-90-357-RMT (C.D. Cal. October 1, 1990) (conviction for transmitting without a license) (Judgment and Probation/Commitment Order attached). But see United States of America v. Richard A. Burton, No. 82-1391 (9th Cir. October 25, 1983) (affirming the 1982 conviction for transmitting without a license, while overturning conviction for transmitting obscene language on First Amendment grounds) (attached).

3. This case is ripe for summary decision because there is no genuine issue of material fact for determination at the hearing. The collateral estoppel aspect of the doctrine of res judicata applies to the determinations

made in Burton's three criminal convictions for transmitting without a license. These determinations cannot be challenged in this proceeding.


4. In view of Burton's three criminal convictions for transmitting without a license, all of which occurred following the revocation and suspension of his amateur station and operator licenses, it is evident that Burton does not possess the requisite character qualifications to be an amateur service licensee. Burton's convictions are relevant to evaluating the likelihood that he will comply with the Communications Act and the Commission's Rules as a licensee in the amateur service. See Character Qualifications, 102 FCC 2d 1179, 1183, recon. denied, 1 FCC Rcd 421, 424 (1986); TeleSTAR, Inc., 2 FCC Rcd 2860, 2866 (1988); Character Qualifications, 5 FCC Rcd 3252 (1990).¹

5. Accordingly, the Bureau requests that a summary decision be issued pursuant to Section 1.251 of the Commission's Rules, 47 C.F.R. § 1.251, denying Burton's application for amateur station and operator licenses.

Respectively Submitted,

Ralph A. Haller
Chief, Private Radio Bureau

By



Eric Malinen
Marc Martin
Attorneys

Dated: July 31, 1992

¹ The Character Qualifications cases pertain specifically to broadcasting but the policies of those cases are applicable outside the field of broadcasting when, as in this proceeding, the character issues raised are pertinent to Burton's qualifications to hold the particular license for which he has applied. See TeleSTAR, Inc., 3 FCC Rcd 2860, 2866 (1988).

Certificate of Service

I, Ivy Harris, certify that on July 31, 1992 a copy of the foregoing Motion for Summary Decision, filed on behalf of the Chief, Private Radio Bureau, was sent by First Class Mail, to:

Mr. Richard A. Burton
1653 West Anaheim Street, #7
Harbor City, CA 90710

and

Administrative Law Judge
Edward J. Kuhlmann
(hand-carried)


Ivy Harris

SIGNED BY ABOVE
MAILED BY

SEP 1 - 1981

MAIL BRANCH

Attachments, *Compliance D.O/PKB*
Burton case, PR Docket No. 92-144
Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of
Revocation of License of

RICHARD A. BURTON
P. O. Box 313
Chatsworth, California 91311

Licensee of Station WB6JAC in
the Amateur Radio Service

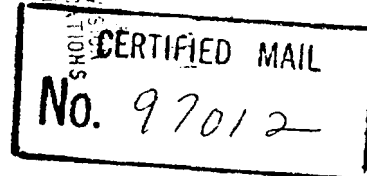
Suspension of License of

RICHARD A. BURTON
P. O. Box 313
Chatsworth, California 91311

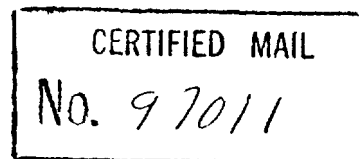
Amateur General Class
Radio Operator License

PR DOCKET NO. 81-443

PR DOCKET NO. 81-444



RETURN RECEIPT REQUESTED
FEE PAID



ORDER OF REVOCATION AND AFFIRMATION

Issued: September 11, 1981

1. The Chief of the Private Radio Bureau ORDERS that the license for Amateur Radio Station WB6JAC, granted July 8, 1979, IS REVOKED, effective September 11, 1981. Additionally, the June 10, 1981 order suspending the Amateur General Class operator license of Burton is hereby AFFIRMED and Burton is ORDERED to forward his license to the Commission within 15 days. 1/

2. This action is taken under the authority contained in Sections 312(a)(2), (4) and (c) of the Communications Act of 1934, as amended, and Section 0.331 of the Commission's Rules. This proceeding began on June 10, 1981, when the Commission ordered the licensee to Show Cause why his Amateur station license should not be revoked and ordered his Amateur General Class operator license suspended for the remainder of the license term. On August 6, 1981, the Private Radio Bureau served interrogatories and a Request for Admissions on Burton which he failed to answer. On August 26, 1981, the Bureau filed a Motion to Compel, requesting that if Burton did not comply with an Order to Compel, he be deemed to have waived his right to a hearing and that the case be certified to the Commission for administrative disposition (Section 1.323 and 1.92 of the Rules).

3. On August 28, 1981, an Order issued ordering Burton to answer the interrogatories within seven days and further ordering that if Burton failed to respond he would be deemed to have waived his right to a hearing, the hearing would be cancelled and the case certified to the Commission. As a result of Burton's failure to respond, on September 10, 1981, the Chief Administrative Law Judge certified

1/ See enclosed form entitled "Additional Information".

this matter to the Commission for administrative disposition under Section 1.92(c) of the Commission's Rules. Due to Burton's failure to respond to the Request for Admissions, the matters contained in the Request are deemed admitted. See Section 1.246(b) of the Commission's Rules.

4. This revocation and the suspension are based upon Burton's operation of the captioned station in wilful violation of the following Amateur Radio Service Rules, which are set forth in full in Part 97, Amateur Radio Service Rules and Regulations: 97.84(a) (station identification requirements); 97.85(d) (one-way communications); 97.85(e) (station control); 97.91 (one-way communications); 97.113 (broadcasting prohibited); 97.125 (malicious interference) and 97.119 (transmission of obscene, indecent or profane words, language or meaning). These operations were observed by Commission engineers who electronically traced the transmissions to the licensee's station on December 10 and 23, 1980 and inspected his station on December 10, 1980.

5. On January 19, 1981, the Commission sent Burton an Official Notice concerning these violations. In his response of February 7, 1981, Burton admitted violation of Section 97.85(e); he said he did not understand the violation of Section 97.113 and he denied all other violations. He said his one-way transmissions were of code and he submitted unsubstantiated xerox copies of purported letters from other amateurs for Commission consideration.

6. Burton's denial of broadcasting and of one-way transmissions is refuted by the transmissions made by him as monitored by the Commission engineers. Burton failed to use his Commission assigned call sign at the conclusion of the transmissions.

7. Burton's transmission on December 23, 1980, of obscene and indecent language through sexual innuendo and scatological words violated Section 97.119 of the Commission's Rules. The Commission has determined that the transmission of radio communications containing certain explicit words (or forms thereof) including "shit" are patently offensive to listeners, and that radio communications containing such words fall within the prohibition of 18 U.S.C. 1464. WUHY-FM, 24 FCC2d 408, 18 RR2d 860 (1970), In re Citizens Complaint Against Pacifica Foundation Station WBAI (FM), 56 FCC2d 94, 438 U.S. 726 (1978). Of particular concern was the protection of children and consenting adults who do not want such language transmitted into their homes. There are 66 licensed amateurs in Burton's area under the age of 18. The youngest is 9. Furthermore anyone, including children, who has a short wave receiver can listen to amateur transmissions even if not an amateur licensee.

8. Commission engineers during monitoring of Burton's transmissions on December 10 and 23, 1980, determined that he wilfully interfered with transmissions of other amateur operators. Other operators complaining of Burton's interference with their transmissions are part of the recorded intercepts. The practice of jamming or interfering with another amateur's transmissions cannot be tolerated by the Commission. Even a single instance would warrant revocation. Burton is the subject of 69 complaints to the Commission. His record of obscene and indecent transmissions and his deliberate interference with amateur transmissions would each be sufficient to warrant license revocation and suspension. When coupled with

his record of other rule violations, license revocation is not only warranted but is essential. Roy A. Filbert, 6 FCC 883 (Rev. Bd. 1967); Armond J. Rolle, 31 FCC2d 533 (Rev. Bd. 1971).

9. This Order is being sent by Certified Mail and Regular Mail to the captioned address and to 8726 Independence #216, Canoga Park, California 91304.

Chief, Private Radio Bureau

By:

Raymond A. Kowalski

Raymond A. Kowalski
Chief, Compliance Division

his record of other rule violations, license revocation is not only warranted but is essential. Roy A. Filbert, 6 FCC 883 (Rev. Bd. 1967); Armond J. Rolle, 31 FCC2d 533 (Rev. Bd. 1971).

9. This Order is being sent by Certified Mail and Regular Mail to the captioned address and to 8726 Independence #216, Canoyo Park, California 91304.

Chief, Private Radio Bureau

By:

Raymond A. Kowalski
Chief, Compliance Division

RECEIVED

OCT 2 1983

FILED

OCT 24 1983

APPELLATE SECTION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

RICHARD A. BURTON,

Defendant-Appellant.

NO. 82-1391

USDC NO. CR 82-378-1-MLR

M E M O R A N D U M

Appeal from the United States District Court
for the Central District of California

Hon. Manuel L. Real, Judge Presiding

Submitted:** February 8, 1983

Before: CHAMBERS, NELSON, and NORRIS, Circuit Judges.

Appellant Richard A. Burton was convicted after a bench trial of operating a radio transmitting apparatus without a license in violation of 47 U.S.C. §§ 318, 501, and of broadcasting obscene language in violation of 18 U.S.C. § 1464.

Appellant has stipulated that he made all of the broadcasts charged in the indictment. Appellant claims that the government failed to produce sufficient evidence to prove that his transmissions crossed state lines. We disagree. There was circumstantial evidence that appellant's broadcasts were strong enough to reach Mexico. Moreover, we have

1 previously held that "18 U.S.C. § 1464 does apply to all
2 citizen's band radio communications even where it is not proven
3 that the transmission involved did in fact cross state lines."
4 Gagliardo v. United States, 366 F.2d 720, 723 (9th Cir. 1966);
5 cf. United States v. Oxendine, 531 F.2d 957 (9th Cir. 1976)
6 (requiring a higher standard of proof for statute that
7 specifically mentions interstate commerce).

8 We reverse, appellant's felony conviction of
9 broadcasting obscene language in violation of § 1464, however,
10 because we find no evidence in the record to support a finding
11 that appellant's broadcasts "appealed to the prurient interest"
12 and so constituted obscenity within the meaning of Miller v.
13 California, 413 U.S. 15 (1973) (defining constitutionally
14 unprotected obscenity). Since the speech in this case was not
15 obscene, we apply the general rule that the government violates
16 the first amendment if, "absent a more particularized and
17 compelling reason for its actions," it subjects a speaker to
18 criminal sanction merely because of the offensiveness of his
19 language. Cohen v. California, 403 U.S. 15, 26 (1970).

20 Appellant's misdemeanor conviction for broadcasting
21 without a license is affirmed and the case is remanded to the
22 district court for sentencing.

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24 AFFIRMED IN PART AND REVERSED IN PART
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** The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit.

United States District Court for

CENTRAL DISTRICT OF CALIFORNIA

RICHARD A. BURTON

DOCKET NO. CR 82-378-R

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR
January 16, 1984

COUNSEL

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.
☒ WITH COUNSEL Mark O. Heaney, Appointed
(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea, ☐ NOLO CONTENDERE, ☒ NOT GUILTY

FINDING & JUDGMENT

There being a finding ~~not guilty~~ of ☐ NOT GUILTY. Defendant is discharged.
☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of transmitting without a license, in violation of Title 47, U.S.C., §318; 501, as charged in counts one, two, three and four of the Indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year on each of counts one, two, three and four.

IT IS FURTHER ADJUDGED, as to counts three and four, that pursuant to Title 18, U.S.C., §3651, the defendant shall be confined in a jail-type institution for the first six months; the balance of the sentence is suspended and the defendant is placed on probation for a period of five years on the conditions that he obey all federal, state and local laws; comply with all rules and regulations of the probation officer and that he shall not be found in any place in which any kind of broadcast is made by radio or otherwise, during the period of his probation.

IT IS FURTHER ADJUDGED that the sentence on counts three and four shall run consecutively and not concurrently to the sentence on counts one and two.

IT IS ORDERED that the execution of the sentence herein imposed is staye until 12 Noon on January 23, 1984, at which time the defendant is to report directly to the institution designated or in default thereof to

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

ADDITIONAL CONDITIONS OF PROBATION

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends, the office of the United States Marshal at Los Angeles, California.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
☒ U.S. District Judge

☐ U.S. Magistrate

MANUEL L. REAL

Date 1/16/84

A TRUE COPY
ATTEST NOV 19 1984
PHILLIP B. WINBERRY
Clerk of Court
by: *P. Williams*
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	No. 84-5036
)	
Plaintiff-Appellee,)	DC# CR-82-378-1-MLR
)	Central California
vs.)	
)	
RICHARD A. BURTON,)	ORDER
)	
Defendant-Appellant.)	
)	

Before: TUTTLE,* NORRIS, and BEEZER, Circuit Judges.

In United States v. Burton, No. 82-1391 (9th Cir. Oct. 25, 1983), a prior panel of this court reversed appellant's felony conviction, affirmed his misdemeanor conviction and remanded the case for sentencing. The district court's imposition on remand of an increased sentence on the misdemeanor conviction was invalid. See United States v. Kaye, No. 83-5795, slip op. at 3469 (9th Cir. Aug. 6, 1984). The judgment appealed from is vacated, and the case is remanded to the district court for entry of judgment imposing the original sentence on the misdemeanor conviction.

*The Honorable Elbert B. Tuttle, Senior Circuit Judge for the United States Court of Appeals for the Eleventh Circuit, sitting by designation.

RICHARD A. BURTON

DOCKET NO. CR 82-378-R

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR
December 17, 1984

COUNSEL

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.
☒ WITH COUNSEL Mark O. Heaney, Appointed
(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea, ☐ NOLO CONTENDERE, ☒ NOT GUILTY

FINDING & JUDGMENT

There being a finding ~~and~~ of ☐ NOT GUILTY. Defendant is discharged.
☒ GUILTY.
Defendant has been convicted as charged of the offense(s) of transmitting without a license, in violation of Title 47, U.S.C., Section 318; 501, as charged in counts one, two, three and four of the Indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year on each of counts one, two, three and four.
IT IS ADJUDGED that pursuant to Title 18, U.S.C., Section 3651, the defendant shall be confined in a jail-type institution for the first six (6) months; the balance of the sentence is suspended and the defendant is placed on probation for a period of five years on the conditions that he obey all federal, state and local laws; comply with all rules and regulations of the probation officer and that he shall not be found in any place in which any kind of broadcast is made by radio or otherwise, during the period of his probation.
IT IS FURTHER ADJUDGED that the sentence on counts one, two, three and four shall run concurrent with each other and not consecutive.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge

☐ U.S. Magistrate

MANUEL L. REAL

Date 12/17/84 19 DEC 1984

*Hand-Mailed
12-20-91*

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

20 DEC 1991

In Reply Refer To:
7240-F
90021

Mr. Richard Burton
1653 West Anaheim Street
Harbor City, California 90710

Dear Mr. Burton:

This refers to your pending application for amateur station and operator licenses. As you know from previous correspondence, we have held your application in abeyance pending the resolution of a criminal proceeding against you in U.S. District Court for the Central District of California (case number CR-90-357-RMT). In your recent letter, you note that, as of October 1, 1991, your probation from that court proceeding has concluded, and you request that we now grant your application. For the reasons described below, we must deny your request.

The federal criminal trial was only the latest in a series of proceedings in which you were found to have violated the radio provisions of either the Communications Act of 1934, as amended, 47 U.S.C. § 301 et seq., or the Commission's Rules, 47 C.F.R. Part 97 (amateur service rules). On September 11, 1981, we revoked your former amateur service license (WB5JAC) because you had violated the operating procedures of Part 97. Thereafter, you repeatedly operated radio apparatus without the required federal license. As a result of your unlicensed operation, on December 17, 1984, you were convicted of having violated Section 318 of the Communications Act, and were sentenced to 4 years of imprisonment. All but the first six months of your sentence were suspended, and you were placed on five years of probation, to end December 17, 1989. By December 31, 1984, you had been released from imprisonment as a result of credit given for your pretrial detention. _

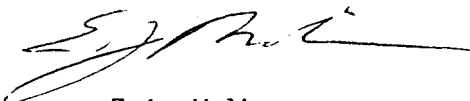
The terms of your probation specified that you could not be in any location where radio transmitting apparatus was operated. Nonetheless, on December 31, 1984, immediately following your release from imprisonment, you were detected operating radio apparatus without a license. As a result, your sentence was modified to include therapy.

On March 10, 1990, shortly after your probation ended, you again operated radio transmitting apparatus without a license. As a result, on October 1, 1990, you were again convicted of violating Section 318 of the Communications Act, were sentenced to pay a fine of \$2,000, and were placed on probation for one year. During the period of probation, you again were prohibited from being in any place where radio transmitting apparatus was operated. As you state, this second period of probation ended on October 1, 1991.

Because of your extensive history of radio-related violations, we do not believe that granting your amateur service application would serve the public interest, convenience, and necessity. If you decide to pursue this matter further, we will designate your application for an administrative hearing under Section 309(e) of the Communications Act. This hearing would be a formal evidentiary proceeding presided over by an administrative law judge, and your record of adjudicated violations, described above, would be put into evidence.

You are requested to respond to this letter within 20 days of its date, stating whether you intend to pursue your application. If you do not respond within that time period and state that you will pursue your application, we will dismiss the application under Section 1.961(b) of the Commission's Rules, 47 C.F.R. § 1.961(b). Please direct your response to: Federal Communications Commission, Special Services Division, 2025 M Street, N.W., Washington, D.C. 20554, Attention: Thomas D. Fitz-Gibbon, Room 5322.

Sincerely,

A handwritten signature in dark ink, appearing to read "Eric Malinen", with a long horizontal flourish extending to the right.

Eric Malinen
Senior Attorney
Special Services Division

PRIVATE RADIO
SPECIAL AGENT

February 1, 1992

Richard Burton
1653 W. Anaheim Street #7
Harbor City, CA 90710
(310) 530-3544

Federal Communications Commission
Special Services Division
2025 M Street, N.W., Room 5322
Washington, D.C. 20554
Attn: Thomas D. Fitz-Gibbon

Reference: 7240-F
90021

Dear Mr. Fitz-Gibbon:

Pursuant to Mr. Eric Malinen's letter of December 20, 1991, and 47 C.F.R. § 1.961(b), I desire to pursue my application for an Amateur Radio license. Mr. Malinen's letter states "If you decide to pursue this matter further, we will designate your application for an administrative hearing under Section 309(e) of the Communication Act." Please, pursuant to 47 C.F.R. § 1.973(d), schedule a hearing at the Commissions convenience.

Thank you for your consideration and concern during my recent illness and hospitalization.

Sincerely,



Richard Burton